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ABSTRACT

The focus of this chapter is on the substantive constitutional protections of the public school employment relationship guaranteed by the First Amendment, particularly freedom of speech, and by the Fourteenth Amendment's right to privacy. Included are burden-of-proof standards required for establishing a prima facie case of denial of these constitutional rights and also the requirements an employer must meet when seeking to rebut the evidence submitted in the case. The first section covers First Amendment rights of teachers, including a teacher's freedom to speak out, freedom to associate, academic freedom, right to be politically active, and freedom of religion as these are balanced against the state's interest in effective education. The second section reviews cases concerning teachers' constitutional rights to privacy when school administrators and local boards attempt to control teachers' activities outside the classroom and off the school campus. The final section provides guidance on burden of proof in First Amendment and privacy cases. The conclusion provides nine generalizations, based on case law, with respect to the foregoing constitutional issues. (TE)

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Substantive Constitutional Rights: The First Amendment and Privacy

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The First Amendment to the Constitution, adopted in 1791, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

On its face this Amendment appears to apply only to Congress. But the 14th Amendment, adopted 77 years later, prohibits a state from abridging "the privileges or immunities of citizens" and from depriving any person of liberty without due process of law. One of the provisions of the Bill of Rights that has been incorporated into the due process clause of the 14th Amendment is the First Amendment.[1] It now applies fully to the states, and thus to the entire public education establishment.[2]

Not all personal rights fundamental to a free people and implicit in the concept of an ordered liberty have specifically been set forth in either the Bill of Rights or the 14th Amendment. Recognizing this situation, the Ninth Amendment to the U.S. Constitution provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Although it based its earlier rulings on an implicit right to privacy, the Supreme Court explicitly recognized a constitutional right to privacy in 1965.[3] It, too, is

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part of the 14th Amendment, and it, too, is binding on the states and the public education establishment.

With these legal developments in mind, the focus of this chapter will be on the substantive constitutional protections of the public school employment relationship guaranteed by the First Amendment, particularly freedom of speech, and by the 14th Amendment's right to privacy. Woven into this chapter are the burden-of-proof standards required for establishing a prima facie case of denial of these constitutional rights and also the requirements an employer must meet when seeking to rebut the evidence submitted in the case.

First Amendment Rights of Teachers

Any notion that public school teachers and students are bereft of First Amendment as well as other constitutional rights was laid to rest in 1969 in *Tinker v. Des Moines Independent Community School District*,[4] where the U.S. Supreme court ruled:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

The question for courts, school attorneys, and school administrators since the *Tinker* case has been to determine what rights teachers and students take with them beyond the schoolhouse gate and just how far these rights might be taken "in light of the special characteristics of the school environment." Although some cases are definitive within their factual circumstances, the Supreme Court has yet to decide a case that sets all the boundaries of First Amendment rights of elementary and secondary school teachers in the school environment. Thus this discussion should not be considered exhaustive or definitive.

A Teacher's Freedom to Speak Out

Pickering v. *Board of Education*,[5] a leading case, partially clarified a teacher's right to freedom of speech under the First and 14th Amendments. As background for understanding the case, an Illinois school board had asked voters to approve a bond issue to build two new schools. The proposal passed on its second submission and the schools were built. The board then began a campaign to increase tax rates and to use the additional funds for educational programs. This campaign failed twice. During the second campaign to increase tax rates, Pickering, a teacher in the district, wrote a letter to the editor of the local newspaper in which he attacked: 1) the way in which the board handled the earlier school

bond issues, 2) the way in which the board allocated funds between the educational and athletic programs, and, in addition, 3) charged the superintendent of schools with attempting to silence teachers, preventing them from opposing or criticizing the proposed tax increases.

The board dismissed Pickering for writing and publishing the letter. But Illinois law required the board to hold a hearing on Pickering's dismissal. At the hearing the board sought to justify its actions by charging that numerous statements in Pickering's letter were false and to the detriment of members of the board and the administration. After hearing testimony, the board found Pickering's statements to be false as charged. However, the board made no finding on the effects of Pickering's published letter, whether on the community as a whole, on the administration of the school system, or particularly on his effectiveness in the classroom.

The Supreme Court recognized "the special characteristics of the school environment," stating that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Thus the problem in Pickering's case came down to arriving at a balance between the interest of the teacher, as an ordinary citizen, in commenting on matters of public concern and the interests of the state, as an employer, in promoting the efficiency and effectiveness of the public services it performs through its employees. The question facing the Court was whether a teacher's exercise of freedom of speech impairs institutional effectiveness, and, if so, whether that impairment is so great as to justify restricting a teacher's freedom of speech.

The Court weighed those statements of Pickering that, it agreed, were unintentionally false. After careful consideration the Court concluded that the false statements, although critical of the board, were "neither shown nor could be presumed to have in any way either impeded the teacher's performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."

Given the overall conclusion that Pickering's letter did not affect school discipline, effectiveness, or harmony among his co-workers, the state's interest in limiting Pickering's freedom of speech was held to be "not significantly greater than its interest in limiting a similar contribution by any member of the general public." Thus the state's interest weighed little in the overall balance. On the other hand, Pickering's right to free speech was, indeed, given considerable weight. The Court noted that a teacher may have a special vantage point from which to formulate an "informed and definite" opinion about the allocation of school funds, making it essential that teachers be able to speak out without fear of retaliation.

Consequently, the Court ruled for Pickering, and in doing so, it laid

down a rule of constitutional law that applies to other cases like his where the fact of public employment is only tangentially involved in the subject matter of a teacher's public communication: "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

A critical element of the Supreme Court ruling in *Pickering* is the nature of the state's interest. That interest was described as "promoting the efficiency of the public services it performs through its employees." Thus when a teacher speaks out publicly, it is generally the effects of the content of his statements that must be assessed to determine whether they impede "the teacher's proper performance of his daily duties in the classroom or . . . interfere with the regular operation of the schools generally."[6] If they do not, then the decision is obvious: Pickering's precedent governs, even if some of the teacher's statements are false or marginally impair school effectiveness.

If, on the other hand, the teacher's public expression significantly impairs his effectiveness or interferes significantly with the regular operation of the schools, the decision is no longer obvious. The decision does not automatically favor the state in such a situation, but the balance is closer, and a court now must weigh the amount and duration of the teacher's ineffectiveness or interference with school operations due to his exercise of freedom of speech against his right to freedom of speech and its role in our society. In each context of close balancing, striking the right balance may involve differing considerations and produce different legal conclusions depending on the weights of the relevant considerations in each specific case.

In a recent case the Supreme Court reaffirmed and extended the *Pickering* precedent to apply to private communications between a teacher of English and her school principal, which were described by the principal as "insulting," "hostile," "loud," and "arrogant."[7] Freedom of speech, the Court ruled, is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." Clearly, however, private expression in such circumstances may bring into balance factors that were not present in Pickering's case. When a teacher personally and insultingly confronts his immediate administrative superior, the employing school district's institutional efficiency may be threatened not only by the effects of the content of the teacher's message, as in *Pickering*, but also by the time, place, and manner in which the teacher delivers his message. On the other hand, this extension of *Pickering* probably means that a teacher may not be removed for "insubordination" solely because of private hostile or arrogant communications made to a principal about school policies or pro-

grams at a time, place, and in a manner that do not impair the teacher's or the institution's efficiency.

The *Pickering* "balancing approach" must be used by lower courts in this kind of case, and their decisions have further defined a teacher's right to freedom of speech. For example, in 1974 the Eighth Circuit Court of Appeals decided a case in which a mathematics teacher had been dismissed because, during his algebra class, he emotionally stated that the students were "4,000 strong"; that they could throw military recruiters, who were then present and recruiting, off the school's campus; and that the students and faculty should decide who should visit the school.[8] Some students testified that the teacher told them to throw their apples at the recruiters and "to get them in a crowd, and push them and kick them, make them feel like they weren't wanted." Later, the teacher personally confronted the recruiters and told them "We don't want you here."

The court ruled that the *Pickering* balance tipped against the teacher because his statements were "infused with the spirit of violent action" to the degree that school authorities could find a situation of disruption. In addition, the teacher's remarks were unrelated to his class and interfered with the operations of the school, which had granted permission for military recruitment. The state's interest in institutional efficiency outweighed the teacher's interest in free speech.

On the other hand, a teacher's dismissal after he twice refused the orders of two principals to remove a black armband was reversed by another federal appeals court.[9] The teacher wore the black armband "as an expression of his religious aversion to war in any form and as a sign of his regret over the loss of life in Vietnam." He made no attempt to proselytize his students. The court agreed that free speech was involved. There was no evidence that wearing the black armband impaired the teacher's effectiveness or the institutional effectiveness of the school. Consequently, the balance tipped in favor of the teacher's right to freedom of speech.

In yet another case, California's Supreme Court applied the *Pickering* balancing approach to disallow a transfer of a teacher from one school to another because the teacher had exercised his freedom of speech.[10] At a school-sponsored public forum meeting, he vigorously and persistently criticized the school's policy on dress and grooming, its policy on outside speakers, and the administration's refusal to permit publication of a second newspaper. His remarks produced some subsequent disharmony and friction with fellow teachers and with his principal. But there was no evidence that his teaching effectiveness was impaired or that institutional inefficiency resulted from his speech. Ruling that "mere fear of disruption due to the expression of unpopular views will not justify interference with the free expression of opinion," California's Supreme Court held in

favor of the teacher, thereby precluding his transfer as retaliation for speaking out.

One can expect courts to reach the same result if a teacher is demoted, rather than transferred or dismissed, as retaliation for exercising his freedom of speech in a way that does not significantly impair his or the institution's effectiveness. The question is whether the transfer or demotion was punitive retaliation or was necessary for the effective operation of the school district.[11]

Finally, the Supreme Court has ruled that a local school board may not prohibit teachers who are not union representatives from speaking at open meetings where a proposed collective bargaining contract is under discussion, even if the state law directs the local board to prohibit teachers, other than union representatives, from participating.[12] The Court reasoned that "[t]eachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district."

A Teacher's Freedom To Associate

A right to freedom of association is not expressly set forth in the Constitution, but it has been implied from the First and 14th Amendments, and it applies to teachers as well as all other citizens.

During the 1950s the Arkansas legislature passed a statute compelling all teachers, as a condition of employment in a state-supported school, annually to file an affidavit listing without limitation every organization to which they have belonged or regularly contributed within the preceding five years. The law was challenged in the U.S. Supreme Court on the ground that it deprived Arkansas teachers of their rights to personal, associational, and academic liberty protected by the due process clause of the 14th Amendment. Agreeing with the teachers and ruling the law unconstitutional in *Shelton v. Tucker*,[13] the Supreme Court declared that "to compel a teacher to disclose his every associational tie is to impair that teacher's right to free association." It then ruled that the "unlimited and indiscriminate sweep of the statute now before us [and its] comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."

The Supreme Court did not rule out completely the power of the state to compel a teacher to disclose some of his associations under appropriate circumstances involving "the fitness and competency" of a teacher. During and after the McCarthy period, arguments were made that the circumstances were appropriate and that teachers should be compelled to declare whether they were members of the Communist

Party; if they were, they could be terminated. This argument represents a guilt-by-association view. Teachers were confronted with variously worded loyalty oaths. For example, a Florida oath required teachers to swear that they had never "knowingly lent their aid, support, advice, counsel or influence to the Communist Party." In 1961 the Supreme Court declared this law unconstitutionally vague because a law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[14] Three years later the Court declared a Washington oath that required teachers to declare that they were not members of "subversive organizations" unconstitutionally vague.[15]

But suppose the oath is not vague: Can teachers be compelled to state that they are not members of the Communist Party, and be terminated if they refuse to disclaim? The answer is no, because the requirement is ultimately based on guilt by association when it makes membership alone grounds for dismissal. Individual membership in any organization can be innocent, constructive, or destructive. For a loyalty oath involving membership in a suspect organization to be constitutionally valid, it must be individualized, relating to the specific nature of an individual's membership. Thus the Supreme Court has ruled: "Mere knowing membership without specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion."[16] Guilt by association must be eliminated in such a situation.

Although loyalty oaths, especially disclaimer oaths, have been severely curtailed by the Supreme Court, it has not invalidated all oaths as such. To the contrary, the Supreme Court has upheld loyalty oaths for teachers that do not involve disclaimers. Generally, these oaths require teachers to swear that they will uphold federal and state constitutions. Colorado's oath is an example:

> I solemnly (swear) (affirm) that I will uphold the constitution of the United States and the constitution of the State of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter.

The Supreme Court upheld this oath, ruling that it was within the constitutional power of Colorado's legislature to prescribe.[17]

Finally, it should be noted that, whether tenured or not, a teacher's constitutional right to free association includes the right to form and join a union. No teacher can constitutionally be terminated for union activities per se. A federal court of appeals declared that "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process clause of the 14th Amendment, which embraces freedom of speech."[18] In as much as *Shelton* v. *Tucker* settled that "teachers have the

right of free association," this court ruled that "an individual's right to form and join a union is protected by the First Amendment."

A Teacher's Right To Academic Freedom

Academic freedom implies immunity to some natural consequences of freedom of speech and association that ordinary citizens do not enjoy because they do not share the peculiar character and function of the scholar-educator. As such, academic freedom protects the right of faculty members to conduct whatever instruction and research they have been hired to perform consistent with standards of professional integrity. And, as the Supreme Court has declared in a higher education case, academic freedom is protected by the First Amendment.

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."[19]

The Supreme Court has decided no case based directly on a K-12 teacher's academic freedom with respect to classroom activities. It has, however, decided cases in which it indicated that K-12 teachers had rights to academic freedom, but the Court did not define those rights.[20] On the other hand, cases from lower federal and state courts provide some guidelines for academic freedom issues involving assignment of materials and teaching methods. The problems generally arise in contexts where there is no school district policy that expressly prohibits assignment of certain materials or use of certain methods, with such decisions left open to teacher discretion. In this context courts tend to use a balancing test weighing a teacher's interest in academic freedom against the state's need for some measure of control and discipline over public school classrooms.

In one case a teacher of high school English gave each member of his senior class a copy of the *Atlantic Monthly* containing an article by a professor at Yale's medical school.[21] The word "motherfucker" appeared in the article; and the school board attempted to dismiss the English teacher because this "dirty" word was, in the opinion of complaining parents, too shocking for high school seniors to deal with during class discussions of the article. Although the court stated it had "the greatest of respect" for parents, it went on to say that "their sensibilities are not the full measure of what is proper education." The court did acknowledge the state's interest in that "some measure of public regulation of classroom speech is inherent in every provision of public education." But, the court continued:

> When we consider the facts . . . we find it difficult not to think that its application [public regulation] to the present case demeans any proper concept of education [because] the general chilling effect of permitting such rigorous censorship is even more serious. . . . With regard to the word itself, we cannot think that it is unknown to many students in the last year of high school. . . . No doubt its use genuinely offends the parents of some of the students — therein, in part, lay its relevancy to the article. . . . If . . . students must be protected from such exposure, we would fear for their future.[22]

In another case an eleventh-grade English teacher was dismissed by the board because she had assigned materials that allegedly had a "disruptive" effect on the school, and she had refused "the counselling and advice of the school principal."[23] She assigned as outside reading Kurt Vonnegut's story, "Welcome to the Monkey House." The court found that "rather than there being a threatened or actual disruption to the educational processes of the school, the evidence reflects that assigning the story was greeted with apathy by most of the students" and that the assignment "was not such that would materially and substantially interfere with reasonable requirements of discipline." One wonders what assignment would! Moreover, the court found that the story was appropriate for high school age students and that the school board had to carry the burden of showing that the story was inappropriate. It failed.

Ordering reinstatement of the teacher, the court concluded that her "dismissal constituted an unwarranted invasion of her First Amendment right to academic freedom."[24] Presumably, the opposite result would have been reached by the court if the school board had shown the material was "inappropriate," or if assigning the materials was disruptive of reasonable school discipline.

The usual way of proving that assigned materials are "appropriate" or "inappropriate" is by testimony stating the professional judgment of experts in the field, or from other professional standards. Sometimes certain materials are irrelevant to the subject area in the judgment of experts in the field and are, therefore, "inappropriate" and constitutionally unprotected by the First Amendment. For example, a federal appellate court upheld the dismissal of teachers of French, industrial arts, and language arts because they distributed brochures on the joyous pleasures of drug use and sex to their eighth-grade classes even though they did not discuss the subjects in their classes.[25] Academic freedom does not protect this type of teacher behavior.

Academic freedom protects appropriate teaching methods used in situations where no constitutionally reasonable rule of the school district prohibits their use. For example, in one case an eleventh-grade English teacher assigned a novel about a teacher who had taken over a rural one-room school in which the boys sat on one side and girls on the other.[26]

The teacher in the novel intermingled the sexes for classroom seating, and parents vigorously objected. During class discussion of the novel and of cultural taboos, the English teacher wrote the word "fuck" on the blackboard and contrasted it with another word, seeking to demonstrate its taboo quality. After a few minutes of discussion he went on to other matters. He was dismissed by the board for "conduct unbecoming a teacher." The court of appeals upheld a lower federal court's order requiring reinstatement of the teacher, ruling that the lower "court found that the [teacher's] conduct was within standards responsibly, although not universally recognized, and that he acted in good faith and without notice that [the board] as his superiors, were not of that view. Sanctions in this circumstance would be a denial of due process." The board "cannot justify a post facto decision by school authorities that the use of a particular teaching method is ground for discharge, or other serious sanction, simply because some educators disapprove of it."

In another case a high school political science teacher sought to present his class with four points of view from the mouths of their adherents — a Republican, a Democrat, a John Birch Society member, and a communist.[27] Just before the last of these four individuals was scheduled to speak, community pressure was brought to bear, and the board revoked its permission. It orally issued an order banning "all political speakers" from the high school. The teacher sued, claiming the board's action infringed his academic freedom. In deciding this case, the federal district court observed that the "medium is the message"; that the use of speakers was the teacher's medium for teaching; that the "act of teaching is a form of expression and the methods used in teaching are media." Ruling for the teacher, the court stated that the school board's order was unreasonable and that it had unreasonably "suppressed expression which the First Amendment protects."

In a case from Texas a teacher disclosed to his civics class his personal opinion that he was not opposed to interracial marriage.[28] After several parents complained, school officials urged him to confine his teaching exclusively to the assigned textbook, without injecting his opinions. He ignored this advice and several times departed from the text during the next five months. Shortly after administering an allegedly "propagandistic" test on race relations, the school board discharged him on the ground of "insubordination." The court ordered his reinstatement, declaring that a teacher has a right to choose teaching methods that serve a demonstrated educational purpose. "A responsible teacher," the court concluded, "must have freedom to use the tools of his profession as he sees fit."

In another case from Texas a teacher rated as "outstanding" used a method known as "Sunshine simulation" to teach American history of the post-Civil War Reconstruction period.[29] The students recreated the

history of the period by playing roles. This method evoked strong student feelings on racial issues and complaints from their parents. A school official told the teacher "not to discuss blacks in American history" and that "nothing controversial should be discussed in the classroom." No one told her not to continue the project, and she continued it to completion. Later, her contract was not renewed, and she sued. The court of appeals ruled "that classroom discussion is protected activity" and that a teacher's discharge for classroom discussions "cannot be upheld unless the discussions clearly overbalance her usefulness as an instructor."

In summary, when dealing with disputes involving materials or teaching methods that are left to the discretion of the teacher, courts balance the teacher's interest of academic freedom against the state's interest of maintaining control over the public school so it might achieve its objectives. If no constitutionally reasonable school district policy prohibits the use of materials or teaching methods, courts have clearly recognized that public school teachers in situations left to their discretion have rights to academic freedom in the classroom when assigning materials or selecting teaching methods. Courts are not disposed to create general guidelines, and each case is judged individually on its facts.

In the absence of disruption of the school's program, it appears that teachers' claims of academic freedom will prevail when they have discretion and assign materials or use a teaching method approved by a majority of the expert professional opinion in their field. If a significant amount but less than a majority of expert professional opinion supports the teachers' view that the materials or methods serve a serious educational purpose, the teachers probably will still prevail so long as they acted sincerely, professionally, and their school's program was not disrupted. Thus a teacher has a qualified right to assign materials or to use teaching methods that are relevant and, in the opinion of experts of significant standing, have a serious educational purpose. "Relevancy" here refers not only to the subject matter of the course but also to the age and maturity of the students. This much is central to the rationale of academic freedom that is enjoyed by public school teachers.

A Teacher's Right To Be Politically Active

As the *Pickering* case demonstrates, the First Amendment protects a teacher's freedom to speak out on public issues. The First Amendment also protects teachers who actively campaign for political office for themselves or others. School officials cannot infringe on such political activities through demotions, transfers, or dismissals of teachers. Moreover, in *Elrod* v. *Burns* the Supreme Court ruled that employees, such as public school teachers, who hold non-policy making and non-confidential positions, cannot be terminated because their political beliefs and associations are opposed to the policy makers who gain con-

trol of the administrative structures.[30] In other words, "patronage dismissals" of non-policy making employees are unconstitutional. If a teacher should be discharged in such circumstance, the initial burden is on the teacher to present evidence showing that he or she was a non-policy maker and was transferred, demoted, or terminated because of his or her political beliefs, associations, or political activities. The burden then shifts to the board or superintendent to show that its action was justified; and if that cannot be shown, the court will set aside the board's action.

A teacher's right to be active politically is subject to the balancing test and can be limited in order to protect the proper functioning of a school. For example, proselytizing in class will not be allowed. In one case a teacher spoke to a class about a candidate for school superintendent as follows: "Many of you know Mr. Golway, what a fine man he is, and that he hopes to be elected soon; I think he would be more helpful to our department than a lady, and we need more men in our schools. . . . Sometimes your parents do not know one candidate from another." The teacher was suspended for ten weeks. The suspension was upheld because the teacher's remarks were "wholly foreign" to the teacher's subject matter and tended to introduce needless strife into school programs.[31] On the other hand, California's Supreme Court upheld the right of teachers in a teachers union to circulate a petition about education financing to other teachers in a school lounge.[32] The California court used a balancing test, declaring that a teacher's right to be active politically is constitutionally protected unless such political activity presents a "clear and substantial threat" to the proper operation of the school.

Teachers can constitutionally be prohibited from being politically active within their classrooms and from engaging in political activities that interfere with the proper operation of schools. All other peaceful political activities are constitutionally protected. For example, a Kentucky superintendent transferred and demoted seven teachers and administrators "for the betterment of the schools." They had publicly promoted and campaigned for a school board candidate opposed by the superintendent. Characterizing the superintendent's action as retaliatory, arbitrary, and therefore void, Kentucky's Supreme Court ruled in behalf of the teachers.[33]

School district rules can be imposed so long as they are reasonable and do not deny a teacher's right to be politically active. But an intermediate Kentucky court struck down a school board policy requiring that all employees seeking public office take a one-month leave of absence immediately prior to the election.[34] There was no evidence in the case showing that such political activity would lead teachers to neglect their duties or would have an adverse effect on their teaching.

Such evidence, regarding certain types of political activities, does not appear unduly difficult to collect. Thus it appears likely that a reasonable school board rule formulated on the basis of accumulated evidence, and no broader than the evidence, would be upheld in the proper case.

A Teacher's Freedom of Religion

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause is the basis for litigation involving Bible reading, prayers, and other religious instruction in public schools, and financial aid to parochial schools.[35] The Supreme Court has ruled several times that constitutionally protected freedom from established religion means at least that:

> Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious belief or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[36]

The establishment clause can also protect academic freedom. In *Epperson* v. *Arkansas* the Supreme Court had to rule on an Arkansas criminal statute prohibiting the teaching of evolution.[37] A biology teacher had used a textbook that contained a chapter setting forth "the theory about the origin . . . of man from a lower form of animal." Thus under Arkansas law, to teach the chapter would be a criminal offense, but not to do so could be interpreted as insubordination and neglect of duty. Noting that the Arkansas statute "was a product of the upsurge of 'fundamentalist' religious fervor of the Twenties," the Supreme Court ruled the law unconstitutional because it established religion by selecting "from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."

The same decision was decreed by a court where, instead of prohibiting something from the curriculum, a school board required a teacher to teach so-called Creation Science, based on a particular interpretation of the Book of Genesis by a particular religious group.[38] It also

follows from these precedents that teachers cannot proselytize in public schools because, as the Iowa Supreme Court has declared, "our public school system . . . shall not be used directly or indirectly for religious instruction, and above all it shall not be made an instrumentality of proselytizing influence in favor of any religious organization, sect, creed or belief."[39] A teacher's clearly improper use of authority — say to recruit students into a particular religion — can result in dismissal because of the teacher's attempt to establish religion.[40]

The second guarantee of religious freedom contained in the First Amendment is the free exercise clause. It is usually invoked by a teacher when a school board requires the teacher to do something directly conflicting with that teacher's freedom of religion. In this situation the Supreme Court invokes a balancing test weighing the teacher's interest in free exercise of religion against a state's interest in having the teacher comply with state law. For example, some Catholic nuns have been hired to teach in public schools but forbidden to wear religious garb while teaching. The Pennsylvania Supreme Court upheld the constitutionality of a law specifically prohibiting teachers in public schools from wearing religious garments when teaching, in the interest of promoting the religious neutrality of schools.[41] The court reasoned that the statute was aimed at "acts, not beliefs, and only against acts of the teacher whilst engaged in the performance of his or her duties as such teacher." However, other courts have ruled that dress is irrelevant to instruction and have allowed public school teachers to wear religious garb.

In *West Virginia* v. *Barnette* the Supreme Court declared that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[42] It then ruled a compelled flag salute for students to be unconstitutional. Later, a federal court of appeals relied on this approach in upholding the right of a teacher to refuse as a matter of "conscience" to participate in the Pledge of Allegiance, stating "the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence."[43]

On the other hand, a teacher's dismissal was upheld when she refused to teach patriotic materials that a school board reasonably could require.[44] As a Jehovah's Witness, the teacher believed in the biblical injunction not to worship graven images and concluded that to teach about patriotism, love of country, or Abraham Lincoln was tantamount to idolatry. The federal appeals court declared that if her religious beliefs were allowed to control, they would result in a "distorted and unbalanced view" of history. The court ruled that "she has no constitutional right to require others to submit to her views and to forego a portion of

their education they would otherwise be entitled to enjoy."

Thus it can be seen that when free exercise claims are involved in a case, courts look to see whether an accommodation between a state's and a teacher's interest is possible, and if not, they balance and uphold the interest having the greatest weight within the specific context of an individual case.[45]

Privacy Rights of Teachers

Teachers, like all other citizens, have constitutional rights to privacy. The Supreme Court has ruled that this right to privacy encompasses a woman's decision whether or not to terminate her pregnancy during its first two terms, and it applies in many other areas. For example, it also includes the constitutional right of persons to read and observe whatever they please, including hard-core pornography, within the privacy of their own homes.[46]

The issue of the constitutional right to privacy is raised when school administrators and local boards attempt to control the activities of teachers outside the classroom and off the school campus. Teachers properly complain that attempts to control their lives away from school violate their rights to privacy and freedom of association. Thus constitutional rights to privacy and free association can conflict with the axiom that teachers be exemplary models in the community. This is especially true in situations where teachers are involved in homosexuality, unwed pregnancies, or nonconforming lifestyles. Typically, teachers are dismissed or their contracts are not renewed for "immorality" or for "unfitness to teach," and they sue for reinstatement. In such cases, courts first require that any administrative attempt to regulate a teacher's off-campus life must be based on evidence and must bear a rational relationship to that teacher's effectiveness in the classroom, and second they judge whether the overall balance of the interests weigh in favor of the state. Administrators and school boards seeking to control teachers' off-campus lives as a way to instill conventional values in students present neither the necessary rational relationship nor a sufficiently weighty interest to overcome teachers' constitutional right to privacy. Courts, recognizing the dynamic and changing character of American society, approach these problems on a case-by-case basis and do not lay down broad general guidelines about teacher conduct.

The Supreme Court has decided no case pitting the rights to privacy and association of a homosexual teacher against the state's interest in the teacher as exemplar. This unresolved issue continues to create controversy, but other courts provide some guidance. One leading case comes from the California Supreme Court where the board of education revoked a teacher's certificate for private homosexual acts, which the

board said "constituted immoral and unprofessional conduct, and an act involving moral turpitude."[47] The teacher sued to have the board's decision set aside. Ruling in favor of the teacher, the court declared:

> The private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher. . . . Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own business and may not be the basis of discipline.[48]

In short, the question is whether the teacher's off-campus conduct indicates that his or her on-campus teaching effectiveness is impaired. This question must be decided solely on the evidence, which can include the proximity or remoteness in time of the conduct, whether the conduct actually adversely affected students or fellow teachers' teaching effectiveness, the extenuating or aggravating circumstances, and the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers. The California Supreme Court stated that "the Board failed to show that [the teacher's] conduct in any manner affected his performance as a teacher." The court was emphatic: "Before the Board can conclude that a teacher's continued retention . . . presents a significant danger of harm to students or fellow teachers, essential factual premises in its reasoning should be supported by evidence or official notice."

Consistent with the California Supreme Court decision, a lower federal court has declared that "the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protected interests" and that "intolerance of the unconventional halts the growth of liberty." When the case was appealed, the appellate court affirmed, declaring that a homosexual can come out of the closet without fearing a loss of his position so long as his "interviews [do not] disrupt the school, substantially impair his capacity as a teacher, or give school officials reasonable grounds to forecast that these results would flow from what he said."[49]

Another case from a lower federal court dealt with whether an elementary school teacher could be dismissed for "immorality in that the Board has been presented with a physician's certificate stating that [she] became pregnant during the current school year at which time [she was] a single unmarried person."[50] The board made no finding that the teacher's alleged "immorality" had affected her competency or effectiveness as a teacher; and no evidence showed any connection between her pregnancy and her teaching effectiveness. The court ruled for the teacher, holding that the state's "immorality" provision had been applied to the teacher "in a manner which invaded her constitutional right to privacy."

In another case from the New Mexico Supreme Court, a teacher,

rated better than satisfactory, requested maternity leave and then was terminated for immoral conduct "because she was single and had engaged in premarital intercourse, as evidenced by the fact that she was pregnant."[51] Ruling for the teacher, the court declared the burden was on the board and that since "the failure of the Board to make a prima facie showing that good cause existed" for terminating the teacher's employment, the board's action "was arbitrary, unreasonable and not supported by substantial evidence."

Community disapproval of a teacher's lifestyle cannot justify termination as long as the teacher's classroom performance is effective and satisfactory. For example, in a case in which a teacher was not renewed, the official reasons given were that her program was too idealistic; her classrooms had been disorderly; and "there was a lack of dynamics . . . in motivating students."[52] But her principal revealed that the real reasons were recurring rumors that she was having an affair with another resident in the trailer park where she lived; that there was dissatisfaction in the community with the fact that she played cards and that she did not attend church regularly; and that she did not have an attractive physical appearance, which the school required of its physical education teachers. The "lack of dynamics" to which the principal had referred in his letter was her obesity. The jury found that the teacher's contract was not renewed "for constitutionally impermissible reasons" and that "the Board and school principal were acting in bad faith." The federal court entered judgment for the teacher, saying that it was "disinclined to overturn the jury's determination."

Lower courts have split on whether grooming and dress codes for teachers violate their constitutional rights. No Supreme Court decision exists on the subject for teachers, but the Court has upheld the validity of a county's hair grooming regulation for its male police officers. In *Kelley v. Johnson*,[53] Justice Rehnquist placed the burden on the police officer challenging the regulation to show it bore no reasonable relation to safety of persons and property. He stated that the issue on the hair code was whether the regulation was "so irrational that it may be branded 'arbitrary'." He found "that similarity in appearance of police officers" is rational and justified because it "may be based on a desire to make police officers readily recognizable to members of the public, or a desire for the *esprit de corps* which such similarity is felt to inculcate within the police force itself." Thus the Court ruled a rational connection could exist between the hair code and "the promotion of safety of persons and property."

Neither of these two justifying reasons applies easily to public school teachers. Nevertheless, shortly after *Kelley*, a federal court of appeals, relying on *Kelley*, upheld a school regulation requiring all males to wear ties.[54] The court ruled that a board's "dress code is presumptively constitutional" and that the teacher had to carry the burden "of demonstrating

that the dress code is so irrational that it may be branded arbitrary." Since the teacher failed to carry his burden, the court upheld the dress code, saying that in "view of the uniquely influential role of the public school teacher in the classroom, the board is justified in imposing this regulation" and that "teachers may properly be subjected to many restrictions in their professional lives which would be invalid if generally applied."

On the other hand, a different federal court ruled in favor of three males when they challenged a Mississippi school board rule that eliminated long hair and restricted beards and moustaches.[55] The court's reasoning in this case was different from *Kelley* in that a regulation prescribing "grooming habits of adults as condition of public employment, unrelated to one's ability to perform his work, can only be viewed with close judicial scrutiny." This court put the burden on the board to justify its grooming code. The court could find no valid reason for applying a grooming code to teachers and, without proof of disruption, concluded that the board lacked power to require it.

Grooming codes can also be challenged when they treat men and women differently under Title VII of the Civil Rights Act of 1964, which prohibits gender discrimination with respect to "compensation, terms, conditions or privileges of employment."[56] One court has already ruled under this law that a savings and loan association may be able to require all its employees to wear uniforms, but it could not require females to wear uniforms and males to wear business suits.[57] Thus grooming codes for teachers would have to apply equally. Obviously, some variations in grooming will be permitted between the sexes as long as they reasonably are based on acceptable norms and related to educational needs.

Burdens of Proof in First Amendment and Privacy Cases

The first burden of proof teachers must meet when litigating is proving their claim. With the possible exception of grooming code cases, the burden of proof standards for establishing a prima facie case of denial of a teacher's constitutional rights is the same in First Amendment and right-to-privacy suits. The burden on the teacher is to show 1) that the specific activity engaged in came within the First Amendment or privacy guarantees, and 2) that the protected activity was a factor — one factor — motivating the board or a school administrator to take action against the teacher, whether it be reprimand, transfer, demotion, or dismissal. If the teacher can carry this burden, then the administrative action may rest on an unconstitutional foundation. If the administration introduces no evidence, the teacher will win. However, the board or administrator is permitted to show that the state has the weightier interest. It has the burden of introducing evidence on the state's interest. For example, in a

Pickering-type case the board might introduce evidence showing that the teacher's communication destroyed his working relationships with his colleagues and immediate supervisors and impaired his classroom effectiveness with his students. This evidence would show that the state's interest in the efficient operation of its schools had been impaired. Since the board introduced evidence, the court now must invoke the balancing test, weighing the evidence and the interest on each side and ruling in favor of the party with the weightier case.

A second type of burden can apply to all First Amendment and privacy cases when the board fails to carry its burden under the *Pickering* balancing test and loses under that test. This second burden stems from the 1977 Supreme Court ruling in *Mt. Healthy City School District Board of Education* v. *Doyle*.[58] The teacher had been dismissed from his teaching position for complex reasons, some relating to his exercise of free speech rights and some relating to other, valid considerations. He sued. At this point Doyle had the burden of establishing a prima facie case of unconstitutional motivation. This is the same burden that a teacher must carry under the *Pickering* balancing test. Doyle proved his termination was based on at least one unconstitutional factor — retaliation for exercising his right to free speech. The Supreme Court accepted that Doyle had proved unconstitutional motivation on the school district's part but, nevertheless, reversed and remanded the case. A teacher's showing of unconstitutional motivation, said Justice Rehnquist, merely shifts a second, and different, burden to the school district. While it could introduce evidence on the state's interest, the school district could introduce additional evidence showing that it would have reached the same decision, i.e., to terminate Doyle, based solely on other valid (not unconstitutional) factors. If it carries this burden and shows that the teacher would have been terminated on valid grounds, then an invasion of a teacher's constitutional rights is not the "real" basis for the administrative action, and the school board wins.

The Supreme Court's approach in *Mt. Healthy* obviously creates problems. It invites a school board to engage in post hoc rationalizations of what it might have done. The court must examine the various reasons that are proffered and decide which of them are valid. The dilemma facing the court is how to distinguish between what a defendant school board actually would have done absent unconstitutional motivation and a mere post hoc rationalization.

Conclusions

Courts decide individual lawsuits on a case-by-case basis and do not enact general or sweeping guidelines regarding teacher or administrative conduct. Case law seems to support the following statements:

1. Teachers have a constitutional right to communicate their opinions to the public, or to school administrators, about all aspects of the school system. However, if their communication disrupts school programs or substantially interferes with school effectiveness, their right to free speech can be limited.

2. Reprimands, demotions, transfers, dismissals, or any kind of retaliatory action based solely on exercise of First Amendment or privacy rights are unconstitutional and will be set aside.

3. Even if a school district's disciplinary action against a teacher was originally based, in part, on an unconstitutional motivating factor, it will be upheld if the school district can show by a preponderance of the evidence that it would have reached the same decision anyway on valid (not unconstitutional) factors.

4. Where discretion is vested in the teacher, assigned classroom materials and teaching methods must be relevant to the objectives of the course and sincerely used with a serious educational purpose. Age and the intellectual and emotional maturity of students are important factors when experts judge "relevancy."

5. Generally, teachers cannot be required as a condition of employment to sign a disclaimer oath, but they can be required to pledge support to the U.S. and state constitutions. Membership in an organization having some unlawful purposes is an unconstitutional basis for disciplining or terminating a teacher. Questions related to a teacher's fitness to teach must be answered if put to the teacher by the appropriate administrator.

6. A school district cannot discipline or terminate teachers for political activities carried on off-campus, but their activities can be regulated by reasonable rules, based on evidence, that protect the state's interest in operating its schools effectively.

7. School districts must make reasonable accommodations for a teacher's religious beliefs, but neither a teacher nor the school district can promote any religious belief, or all religious beliefs, in classrooms or outside them in any way that affects a school's educational mission.

8. Private conduct of a teacher (e.g., unwed pregnancy or homosexuality) that does not impair a teacher's fitness to teach cannot be ground for dismissal, even if the activity is disapproved of by the community.

9. School districts can impose on teachers reasonable grooming codes that are relevant to achieving school effectiveness.

Footnotes

1. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).
2. For further discussion, *see* Arval Morris, *The Constitution and American Education*, 2nd ed. (Racine, Wisc.: West Publishing Co., 1980), pp. 48-57.

3. Griswold v. Connecticut, 381 U.S. 479 (1965).
4. 393 U.S. 503 (1969).
5. 391 U.S. 563 (1968).
6. 391 U.S. at 572-73.
7. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); *see also* Ayers v. Western Line Consol. School Dist., 691 F.2d 766 (5th Cir. 1982).
8. Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974); Whitsel v. Southeast Local School Dist., 484 F.2d 1222 (6th Cir. 1973) (upheld a dismissal of a teacher because he spoke publicly to a group of protesting students after the principal had ordered them back to their classrooms).
9. James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972).
10. Adcock v. Board of Educ., 513 P.2d 900 (Cal. 1973); *see also* McGill v. Board of Educ., 602 F.2d 744 (7th Cir. 1979).
11. Transfers have been upheld where the teacher's speech "interfere[d] with the management and operation of the school, and create[d] animosity and the possibility of physical violence between plaintiff [the teacher] and the assistant principals," and are not seen as punitive but as based on "legitimate managerial reasons." Austin v. Mehlville R-9 School Dist., 564 S.W.2d 884 (Mo. 1978).
12. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167(1976).
13. Shelton v. Tucker, 364 U.S. 479 (1960).
14. Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).
15. Baggett v. Bullitt, 377 U.S. 360 (1964).
16. Keyishian v. Board of Regents, 385 U.S. 589 (1967).
17. Ohlson v. Phillips, 397 U.S. 317 (1970); *see also* Connell v. Higginbotham, 403 U.S. 207 (1971).
18. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).
19. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
20. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960), and Justice Stewart's concurrence in Epperson v. Arkansas, 393 U.S. 97 (1968).
21. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).
22. *Id.* at 362.
23. Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).
24. *Id.* at 356.
25. Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *see also*, Simon v. Jefferson Davis Parish School Bd., 289 So. 2d 511 (La. App. 1974).
26. Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971).
27. Wilson v. Chancellor, 418 F. Supp. 1358 (D. Ore. 1976).
28. Sterzing v. Fort Bend School Dist., 376 F. Supp. 657 (S.D. Tex. 1972).
29. Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980). *But cf.* Adams v. Campbell School Dist., 511 F.2d 1242 (10th Cir. 1975).
30. 427 U.S. 347 (1976).
31. Goldsmith v. Board of Educ., 66 Cal. App. 157, 225 P. 783 (1924).
32. Los Angeles Teachers Union v. Los Angeles Bd. of Educ., 78 Cal. Rptr. 723, 455 P.2d 827 (1969).
33. Calhoun v. Cassady, 534 S.W.2d 806 (Ky. 1976).

34. Allen v. Board of Educ., 584 S.W.2d 408 (Ky. App. 1979). *See also* the Wyoming Supreme Court's dubious ruling that a teacher cannot be elected to a school board because of an inherent conflict of interest, *Haskins* v. *State*, 516 P.2d 1171 (Wyo. 1973).
35. *See, e.g.*, A. Morris, *supra* note 2, ch. V.
36. McCollum v. Board of Educ., 333 U.S. 203 (1948).
37. 393 U.S. 97 (1968).
38. McLean v. Arkansas Board of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).
39. Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918).
40. LaRocca v. Board of Educ., 406 N.Y.S.2d 348 (Sup. Ct. App. Div. 1978).
41. Commissioners v. Herr, 78 A. 68 (Pa. 1910).
42. 319 U.S. 624 (1943).
43. Russo v. Central School Dist., 469 F.2d 623, 634 (2d Cir. 1972); *accord*, Opinions of the Justices to the Governor, 363 N.E.2d 251 (Mass. 1977).
44. Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).
45. Title VII of the Civil Rights Act of 1964 requires school districts to make "reasonable accommodations" of teachers' religious beliefs. *Cf., e.g.*, TWA v. Hardison, 432 U.S. 63 (1977); Rankin v. Commission on Professional Competence, 154 Cal. Rptr. 907, 593 P.2d 852 (1979), *cert. denied*, 444 U.S. 986 (1979).
46. Stanley v. Georgia, 394 U.S. 557 (1969).
47. Morrison v. Board of Educ., 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969). *But see*, Gaylord v. Tacoma School Dist., 559 P.2d 1340 (Wash. 1977), *cert. denied*, 434 U.S. 879 (1977).
48. 461 P.2d at 382.
49. Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir. 1974). *But see*, Gaylord v. Tacoma School Dist., 559 P.2d 1340 (Wash. 1977).
50. Drake v. Board of Educ., 371 F. Supp. 974 (M.D. Ala. 1974).
51. Board of Educ. v. Stoudt, 571 P.2d 1186 (N.M. 1977).
52. Stoddard v. School Dist., 590 F.2d 829 (10th Cir. 1979); *accord*, Board of Trustees v. Holso, 584 F.2d 1009 (Wyo. 1978); Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973); Thompson v. School Dist., 483 F. Supp. 1170 (W.D. Mo. 1980). *But see*, Sullivan v. Meade School Dist., 530 F.2d 799 (8th Cir. 1976).
53. 425 U.S. 238 (1976).
54. East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838 (2d Cir. 1977); *accord*, Miller v. School Dist., 495 F. 2d 658 (7th Cir. 1974); Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976).
55. Conrad v. Goolsby, 350 F. Supp. 713 (N.D. Miss. 1972).
56. 42 U.S.C. § 2000e-2(a)(1) (1976).
57. Carroll v. Talman Federal Savings & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979).
58. 429 U.S. 274 (1977). For an application of *Mt. Healthy* in the context of a claim to freedom of speech and press under *Pickering*, *see*, Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982). For an application of *Mt. Healthy* in a First Amendment case involving an unwed pregnant teacher, *see*, Avery v.

Board of Educ., 674 F.2d 337 (5th Cir. 1982). For a case applying *Mt. Healthy* in a privacy context involving an unwed pregnant teacher, *see*, Brown v. Bathke, 566 F.2d 588 (8th Cir. 1976).